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In the Supreme Court of the United States

OCTOBER TERM, 1983

BROOKLYN PSYCHOSOCIAL REHABILITATION INSTITUTE,
INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS
BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether substantial evidence supports the Board's finding that counselors at petitioner's rehabilitation facility are not managerial employees excluded from coverage under the National Labor Relations Act.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A9-A12) is not reported. The decision and order of the National Labor Relations Board (Pet. App. A13-A50) are reported at 264 N.L.R.B. 114. The decisions and direction of election by the Board's Regional Director in the underlying representation proceeding (Pet. App. A51-A155) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on January 13, 1984. The petition for a writ of certiorari was filed on April 11, 1984. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTE INVOLVED

Relevant provisions of the National Labor Relations Act, 29 U.S.C. 151 *et seq.*, are set forth at Pet. App. A1-A8.

STATEMENT

1. Petitioner operates a rehabilitation program for deinstitutionalized mental patients. In early 1980, the Union¹ petitioned to represent counselors at petitioner's institute.²

Petitioner's institute comprises a residential facility providing "psychosocial rehabilitation" for approximately 200 residents and a separate facility providing social and vocational training and other rehabilitative services (Pet. App. A120-A121). Generally, the goal of the institute is to impart the very basic skills required to function normally in society, *e.g.*, personal hygiene, cleaning, shopping, cooking, finding an apartment, opening a bank account, and filling out an employment application (Pet. App. A85). Responsibility for the overall development and policies of the institute lies with a board of directors. An executive director is "[r]esponsible for the coordination, operation, staff training, effective functioning and general overall direction of the facility [, including] planning of program, staff assignments, supervision of staff, [and] maintaining required records" (C.A. App. 176). The executive director has general supervisory authority over counselors, and is generally responsible for their hiring, firing, evaluation and discipline (Pet. App. A123; C.A. App. 25, 29, 43, 76, 99, 176, 410).

The institute employs approximately 22 counselors in its two facilities. The counselors are not professionally trained therapists or social workers, and there are no formal educational requirements other than the ability to read and write. Some of the counselors are former residents of the institute.

¹District 1199, National Union of Hospital and Health Care Employees, Retail, Wholesale, and Department Store Union, AFL-CIO.

²In its initial petition filed December 10, 1979, the Union sought to represent all employees at the Institute. The Union later amended its petition to seek a unit consisting only of counselors. Pet. App. A51-A52, A57 n. 5, A119.

Pet. App. A60-A61. Counselors serve as "role models" for residents or "members," assisting them in basic concerns of employment, diet and hygiene, and acting as advocates for individuals in dealing with various governmental agencies. In addition, counselors lead structured group programs involving career counseling, dance and art therapy, crafts, swimming, cooking, interpersonal skills, and other activities. Counselors prepare activity schedules and "treatment plans" for each member in their caseload, outlining how the counselor thinks each will most benefit from the counselor's role model function, and they also prepare periodic status, attendance, and performance reports. Pet. App. A61-A63, A131-A137. Finally, in addition to their duties serving members, counselors help operate the elevator at the residential facility, make repairs to institute property, clean up after members, and conduct initial interviews of persons referred for admission to the institute (Pet. App. A62).

Counselors are closely supervised by the executive director, Irving Link, in handling their caseloads. Although each counselor designs members' treatment plans initially, Link regularly reviews and revises them as he sees fit, and the institute's medical director is required to give formal approval to each program. Pet. App. A63-A64; C.A. App. 257, 525. Link meets with each counselor individually for approximately four hours a week in order to discuss the status and progress of each member and to give Link an opportunity to instruct the counselors on implementation of the various programs. Counselors are not free to alter their group programs without Link's approval. Pet. App. A63-A64, A123; C.A. App. 26, 29, 33, 34, 40, 42, 48, 49, 51. When a counselor has a problem in dealing with an outside agency, the counselor takes the problem to Link or another

supervisor.³ Supervisors have ultimate responsibility for disciplining or directing hospitalization of members. Pet. App. A65; C.A. App. 114, 125. Link schedules the members' group activities (Pet. App. A65; C.A. App. 53). He also closely supervises counselors' maintenance of the required case records (C.A. App. 821, 824, 843, 886, 757, 762).

In addition to their individual meetings with Link, counselors meet with him as a group once a week. These weekly meetings serve primarily as a means by which counselors "receive additional guidance and supervision from the Administration, and general information on the running of the * * * facility" (Pet. App. A92-A93). Among the subjects discussed at these meetings are: matters concerning the discharge, expulsion and admission of members; assignment of counselors to therapy groups and the subject matter, number, and scheduling of such groups; teaching methods; treatment plans for particular members; discipline; and ordering of supplies.

Counselors — like petitioner's other employees who perform housekeeping, food services, maintenance, and clerical functions — punch a time clock and are paid on an hourly basis starting at \$3.10 an hour. All employees receive similar fringe benefits, holidays, overtime pay and leave privileges. Counselors are evaluated on the same evaluation form and for the same performance attributes as other employees. Pet. App. A59-A60; C.A. App. 77, 88, 173-174.

2. Following a hearing on the Union's representation petition,⁴ the Board's Regional Director issued a Decision and Direction of Election on March 24, 1980 (Pet. App. A116-

³In addition to Link, the institute's administration includes the medical director, a manager of the residential facility and a director of the separate rehabilitation center (Pet. App. A58).

⁴At this hearing, petitioner did not contend that counselors were managerial employees. It maintained only that the counselors should be included in a bargaining unit with all other employees, including housekeeping, food services, maintenance, elevator operator, and clerical employees. Pet. App. A54 n.3.

A155). The counselors selected the Union as their bargaining representative, and the Board certified the Union on May 6, 1980 (Pet. App. A52). Thereafter, petitioner moved to reopen the representation hearing record, contending that the counselors were managerial employees exempt from coverage of the National Labor Relations Act, 29 U.S.C. 151 *et seq.*, under this Court's then-recent decision in *NLRB v. Yeshiva University*, 444 U.S. 672 (1980).⁵ The Regional Director granted the motion to reopen the record and a further hearing was conducted from March to May 1981.

At the supplemental hearing, petitioner contended that counselors were managerial employees when the Regional Director issued the March 24, 1980, Decision and Direction of Election, and alternatively that the counselors acquired added duties and responsibilities following the Union's certification that converted them to managerial employees under *Yeshiva* (Pet. App. A56, A95). In a Supplemental Decision and Order, the Regional Director rejected both contentions and affirmed the Union's certification (Pet. App. A51-A115). The Regional Director noted that the Court in *Yeshiva* had found the university faculty members there involved to be managerial employees on the basis of their authority to make final decisions and effective recommendations on a wide range of management concerns, so that the faculty were, " 'in effect, substantially and pervasively operating the enterprise' " (Pet. App. A79-A80 & n.24, (quoting *NLRB v. Yeshiva University*, 444 U.S. at

⁵The Court's decision in *Yeshiva* issued February 20, 1980, on the last day of the initial representation hearing (Pet. App. A77). Petitioner contended that, because *Yeshiva* overruled prior Board precedent, it should be permitted to present evidence on the managerial status of the counselors (Pet. App. A53-A54).

691)).⁶ The Regional Director found that, by contrast, petitioner's counselors made few independent decisions and "performed their duties under close supervision from their supervisors" (Pet. App. A89, A95). The Regional Director found that "counselors made no final decisions or compelling recommendations regarding financial matters, the hiring or firing of other counselors, promotions or evaluations of other counselors, the salaries of counselors, the scheduling of counselors, the amount to be charged members/residents (tuition), or the location of the facility" (Pet. App. A90-A91). Based on the "amount of supervision the counselors receive, the limited skills the counselors are required to have, and the insignificant amount of time the counselors allegedly spend on making 'managerial' type decisions," the Regional Director concluded that the counselors were not managerial employees (Pet. App. A94-A95).⁷ The Board denied petitioner's request to review the Regional Director's decision (Pet. App. A26).

⁶The Regional Director noted that the *Yeshiva* Court found the faculty in that case to have managerial status based on its ability to make final decisions and effective recommendations in matters of curriculum, attendance, teaching methods, grading policies, matriculation standards, student body size, tuition, location of school, teaching loads, student absence policies, faculty hiring, tenure, sabbaticals, terminations, promotions, and budget (Pet. App. A79-A80; see *NLRB v. Yeshiva University*, 444 U.S. at 675-677 & nn.3-5, 686 & n.23).

⁷The Regional Director also rejected petitioner's contention that changes in the counselors' responsibilities after the Union's certification made them managerial employees. Petitioner relied on evidence purporting to show that the job title of counselors was changed to "manager"; that counselors had slightly expanded input into decisions concerning the hiring, firing, and evaluation of other counselors and employees, the admission of persons to the program, the purchase of additional supplies, personnel policies, and hours of the facilities; and that counselors began receiving regular reports concerning the institute's finances (Pet. App. A95-A111). The Regional Director noted that petitioner's evidence was in conflict "as to the extent of independence the counselors have in decisions concerning their own employment

3. Petitioner refused to recognize and bargain with the Union as the counselors' representative, and the Union filed an unfair labor practice charge. The Board's General Counsel issued a complaint and moved for summary judgment on the ground that all issues relevant to the unfair labor practice charge were, or could have been, litigated in the representation proceeding. The Board granted summary judgment, finding that petitioner had violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. 158(a)(5) and (1), and ordered petitioner to recognize and bargain with the Union as representative of the counselors. Pet. App. A42-A46.⁸

4. The court of appeals enforced the Board's order in full. The court held that (Pet. App. A10-A11):

The responsibilities of the Institute's counselors fall far short of that "absolute" authority over academic matters on which the Supreme Court relied in applying the managerial exclusion to the faculty in *NLRB v. Yeshiva University*, 444 U.S. 672, 686 (1980). There, the relevant bargaining unit consisted of all full-time faculty, including Assistant Deans, senior professors

conditions", that counselors continued to perform their duties under close supervision from the Administration, and that their duties and authority were essentially unchanged from their duties prior to March 1980 (Pet. App. A96, A111-A112).

⁸In opposition to the motion for summary judgment, petitioner contended that the Board's intervening post-*Yeshiva* decisions in *Ithaca College*, 261 N.L.R.B. 577 (1982), *Thiel College*, 261 N.L.R.B. 580 (1982), and *Duquesne University of the Holy Ghost*, 261 N.L.R.B. 587 (1982), compelled the conclusion that petitioner's counselors were managerial employees. The Board rejected that contention, finding that each of the cited cases involved university faculty with power to make decisions and effective recommendations similar or identical to the authority of the faculty in *Yeshiva*, and that each of these cases, like *Yeshiva* itself, was therefore distinguishable from the instant case (Pet. App. A18-A27).

and department chairmen. Here, the unit was composed of employees who work forty hours a week, punch a time clock and are paid between \$4 and \$8 per hour. Collectively, they do not exercise the indispensable policy-making role of the Yeshiva faculty. On the contrary, they operate under the close supervision of, and pursuant to administrative directives issued by, the executive director of the Institute.

* * * * *

The conflict of interest concerns which troubled the *Yeshiva* court are minimal here, because the management does not rely nearly so heavily upon the professional judgment of the counselors.^[9]

ARGUMENT

In *NLRB v. Yeshiva University*, 444 U.S. 672 (1980), this Court held that full-time faculty members of that university were managerial employees excluded from coverage of the National Labor Relations Act on the basis of their authority to make final decisions and effective recommendations on a range of policy matters crucial to the operation of the enterprise, including absolute authority in academic matters (see note 6, *supra*). Petitioner's sole contention is that the Board misapplied the holding of *Yeshiva* in concluding that counselors at the mental health rehabilitation facility here involved were not managerial employees. That contention merely amounts to a challenge to the Board's application of settled principles to the facts of this particular case, and thus does not warrant review by this Court. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 490-491 (1951). In any event, as the court of appeals correctly found, the facts

⁹The court also rejected as unsupported by the record petitioner's claim that changes since *Yeshiva* converted the counselors to managerial employees (Pet. App. A11).

summarized in the statement above (pages 2-4, *supra*) provide ample support for the Board's conclusion that the counselors are not managerial employees under the Act.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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